RECORD
AND
BRIEFS.

Supreme Court, U.S.
FILED
SEP 18 2017
OFFICE OF THE CLERK

Nos. 16-1436 & 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
STATE OF HAWAII, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF ART MUSEUM DIRECTORS, THE AMERICAN ALLIANCE OF MUSEUMS, THE ASSOCIATION OF ACADEMIC MUSEUMS AND GALLERIES, THE COLLEGE ART ASSOCIATION, AND 101 ART MUSEUMS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are four organizations that serve the art museum community (the Association of Art Museum Directors, the American Alliance of Museums, the Association of Academic Museums and Galleries, and the College Art Association) and 101 art museums located throughout the United States.[2] The mission of the museums, supported by the organizations, is to serve the public by making great works of art, representing the full range of human experiences, available to a wide audience. This mission is threatened by Executive Order 13,780 (the "Order"), which prevents museums in the United States from presenting certain works of art and performances that reflect the experiences of people from the six countries covered by the Order, as well as from other parts of the world.

The Order has already caused some of the *amici* museums to cancel or postpone planned exhibitions. These exhibitions, which would have showcased important works by artists from the covered countries, are jeopardized because the artists themselves, or other necessary personnel (such as the lenders, collectors, couriers, and curators), are

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

[2] The full list of *amici* art museums is included in Appendix A.

not able to travel to the United States under the Order. Even artists and other contributors not directly covered by the Order have canceled museum events in the United States because of the uncertainty and fear that the Order has created for many foreign nationals. By limiting the range of artistic expression available in the United States, the Order will continue to cause substantial and irreparable harm to the *amici* and the American public.

This brief describes a recent performance in the United States that would not have occurred had the Order been in place at that time, as well as planned exhibitions and performances that are now jeopardized by the Order.

SUMMARY OF ARGUMENT

> *"[T]he life of the arts, far from being an interruption, a distraction, in the life of a nation, is very close to the center of a nation's purpose—and is a test of the quality of a nation's civilization."*[3]

Art has played a pivotal role in defining the United States since its inception. As the primary means by which the public experiences art, museums are an anchor of American culture and democratic society. By fostering creativity, tolerance, and

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[3] John F. Kennedy, The Arts in America, Look, Dec. 18, 1962, at 106.

cultural enrichment, our museums promote American values, both at home and abroad.

The *amici* museums serve the American public by presenting visual arts and performances that cover the full range of human artistic expression. In support of this mission, the *amici* museums regularly host exhibitions with international impact that welcome artists, performers, and visitors from the United States and other countries. These exhibitions foster important cross-cultural exchanges and spark healthy public discussions, which are now threatened by the Order.

On January 27, 2017, President Donald J. Trump signed Executive Order 13,769, which suspended for 90 days "immigrant and nonimmigrant entry into the United States of aliens" from seven predominantly Muslim countries.[4] Following several successful legal challenges to that order, on March 6, 2017, the President issued Executive Order 13,780, which went into effect on March 16, 2017, and originally barred (with certain exceptions) the nationals of six Muslim-majority countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "Designated Countries")—from entering the United States for at least 90 days.[5]

The Order will have a significant negative impact on the *amici*'s ability to conduct the kind of

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[4] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

[5] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

cross-cultural, dynamic global exchanges that make Americans more informed, and thereby, America stronger. Many of these exhibitions and performances are dependent upon the presence of participants who are citizens of one of the Designated Countries. The negative effects of the Order are already being felt, as several museums have postponed or canceled future exhibitions that require foreign artists, lenders, collectors, curators, scholars, couriers, and others whose ability to contribute can no longer be assured.[6]

One of the primary objectives of the Order is "to protect . . . citizens from terrorist attacks."[7] For many foreign artists, their work is a vehicle for political dissent and social commentary, and is frequently among the most effective critiques of the inequities in their countries and the corruption in their governments. By denying entry to all nationals from six predominately Muslim countries, the Order limits the kinds of international collaboration and artistic expression that foster tolerance and understanding of others, which help protect us from the very threats the Order is intended to mitigate.

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[6] In many instances, the Order will not only prevent the exhibition of important works of art in the United States, but it will do so in contravention of national policy. Many exhibitions involving loans of art from foreign countries receive immunity under 22 U.S.C. § 2459. Before granting the protections of the statute, the State Department must determine that the exhibition is in the national interest. In those cases, if the Order causes the exhibition to be canceled, the national interest is, by definition, negatively affected.

[7] Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,209 (Mar. 9, 2017) (Section 1(a)).

ARGUMENT

A successful art exhibition or performance represents the culmination of the time, talent, and expense of dozens of individuals. The *amici* museums cannot commit to launching a significant exhibition or performance if there is a substantial risk that one or more of the key persons involved will not be able to contribute as required.

Although the Order's ban on travel purports to be temporary, it can be renewed, leaving many of the *amici* unable to commit to exhibitions or performances involving artists, scholars, or curators from the Designated Countries even after the expiration of the 90-day period. The loss of these art projects causes substantial harm to the *amici* and the public in general. It does so by depriving Americans of important works of art, great performances, and scholarly presentations, thereby denying them opportunities to gain insights into the history, culture, and aspirations of the people of the Designated Countries.

Addressing the Order's violation of the Establishment Clause, the District Court of Maryland correctly stated that it is in the public interest to "avoid sowing seeds of division in our nation."[8] As the examples below illustrate, many of the art exhibitions that will not be shown and performances that will not occur because of the

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[8] *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017).

Order promote the kind of understanding that makes us less divided and less prone to conflict.

A. An Important Performance That Would Not Have Occurred at the Cleveland Museum of Art

As part of its mission, the Cleveland Museum of Art ("CMA") organizes performances of musicians and other artists from many areas of the world. At these events, thousands of people are able to hear, see, and experience music, dance, and film from across the globe. In the recent past, these performances have included at least one artist from a Designated Country, who would not have been able to participate had the Order been in place at that time. Through his performance, the musician exposed the large audience to musical traditions from the Designated Countries and, by fusing Eastern and Western genres, promoted understanding and tolerance of individuals from the Designated Countries generally. If the Order had been in effect at that time, CMA's efforts to provide the public with the most diverse, inspiring, and thought-provoking music from around the world would have been curtailed.

B. The Order's "Chilling Effects" Has a Detrimental Effect on Amici and the American Public

The text of the Order provides that it is applicable only to citizens of the Designated Countries, but its effects would not be so limited. Nationals of the six Designated Countries—the foreign artists, lenders, curators, scholars, couriers,

and conservators who make these exhibitions possible—live all over the world. Many of them, although not directly covered by the Order, are unwilling to travel to the United States because of the perceived risks associated with attempting to enter the country and a sense of animus that the Order has created toward people from certain countries.

Prominent sculptor Parviz Tanavoli—a dual-national of Iran and Canada—has decided that although one of his sculptures is currently on display at New York's Museum of Modern Art, he will not be traveling to the United States in part "to avoid the risk of being held and interrogated just because I was born in Iran."[9] Tanavoli has been hailed as "an Iranian cultural ambassador and described as one of the most prominent contemporary artists in the Middle East."[10] He has previously been detained in Iran and accused of "disturbing the public peace" because of his provocative artwork.[11]

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[9] Gareth Harris, Iranian Art Market Branches Out, Financial Times (Mar. 17, 2017), https://www.ft.com/content/3f1a3b30-fe81-11e6-8d8e-a5e3738f9ae4.

[10] Zulekha Nathoo, MoMA Takes Quiet Stand Against Trump Travel Ban—and a Canadian Artist Is Part of It, CBC News (Feb. 7, 2017), http://www.cbc.ca/news/entertainment/moma-muslim-art-protest-1.3968411.

[11] Rachael Pells, Iranian Artist Parvis Tanavoli Accused of 'Disturbing Public Peace' with Nude Artworks, Independent (July 11, 2016), http://www.independent.co.uk/arts-entertainment/art/news/iranian-artist-parviz-tanavoli-accused-of-disturbing-public-peace-with-nude-artworks-a7131386.html.

The Portland Art Museum similarly has become concerned about its ability to obtain the proper visas for internationally renowned Syrian calligrapher, Khaled Al-Saa'i. Al-Saa'i uses Arabic calligraphy as a medium of expression to create dramatic abstract compositions, such as a mural representing the Syrian civil war.[12] He has previously exhibited in the United States and has taught as visiting faculty at several American institutions. Al-Saa'i is slated to create a mural covering the Portland Art Museum's indoor sculpture court, but that is now in question due to the Order.

These examples, which are by no means exhaustive, will grow in number so long as the Order continues to create uncertainty and fear for those foreign artists and other necessary participants who would otherwise contribute to exhibitions and performances in the United States.

The Order also jeopardizes exhibitions that are made possible through site visits by nationals of the Designated Countries, including representatives of the individuals or institutions who own the collections, scholars who write and speak about the art, curators who co-organize the exhibitions, and couriers and conservators who accompany and protect the artworks.

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[12] Marion Kudla, Khaled Al-Saa'i Brings Calligraphy Art to Swarthmore, Phoenix (Mar. 31, 2016), http://swarthmorephoenix.com/2016/03/31/khaled-al-saai-brings-calligraphy-art-to-swarthmore/.

The Museum of Fine Arts Houston ("MFAH") is preparing an important exhibition of the premier collection of Persian art, from antiquity to the nineteenth century, in private hands. Over 600 items, examples of some of the finest Persian manuscripts, carpets, ceramics, and metalwork anywhere, have been placed on loan in Houston by the collector, an Iranian expatriate who left Iran prior to 1979 and has since lived in Europe and the Middle East but still holds an Iranian passport. Although the objects have been legally imported into the United States with the appropriate licenses, the Order would prevent the owner of the objects from visiting the exhibition of his own property. Because this collector could, at any time, ask for the immediate return of his collection, there is a significant risk that animus generated by Order could lead to a recall of his art, which would cause this important exhibition to be canceled. It is this kind of uncertainty that has discouraged museums like MFAH from planning future exhibitions that rely on the support of persons who are nationals of the Designated Counties. When these types of exhibitions are canceled, or never planned, because of the Order, the American public is denied the opportunity to view and study unique works of art that provide an invaluable window into world culture.

The full consequences of the Order to the *amici* can only be appreciated by multiplying these examples many times over. Other similar exhibitions and events will not occur, because lenders, curators, and scholars will be unable to attend the exhibitions, speak at the openings, and

work with their American colleagues on the catalogues in the United States.

C. The Waiver Provision Does Not Prevent This Harm

The Order's waiver provisions do not protect the *amici*'s interests. Section 3(c) of the Order provides for discretionary waivers of an otherwise-barred foreign national if he or she can show that a denial of entry "would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest."[13] Neither "undue hardship" nor "national interest" is defined in the Order and the Government has provided no official guidance on how it will interpret and apply these terms. Section 3(c)(iii) provides that a waiver may be appropriate for a foreign national "enter[ing] the United States for significant business or professional obligations and [where] the denial of entry during the suspension period would impair those obligations."[14] What might amount to "significant business or professional obligations" is not further defined or clarified in the Order or elsewhere.

Museums plan exhibitions and performances months, and often years, in advance. The uncertainty of whether artists or other necessary personnel will receive discretionary waivers, based

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[13] Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,214 (Mar. 9, 2017) (Section 3(c)).

[14] *Ibid* (Section 3(c)(iii)).

on ambiguous and undefined criteria, will effectively prevent the *amici* museums from planning many exhibitions and performances that are dependent on persons covered by the Order.[15]

CONCLUSION

The Order harms the *amici* and the public by preventing or discouraging many artists, lenders, curators, and scholars from traveling to the United States. Without their presence, *amici* museums will, in many cases, be unable to hold performances and showcase art originating from the Designated Countries, as well as other parts of the world—art and performances that often foster the tolerance and understanding needed to deter the kinds of conflict that the Order purports to be trying to prevent. The Court should affirm the court below and allow this important art to be shown and performances to be held in the United States, which make a significant contribution to our culture and the richness of American society.

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[15] Moreover, the Order does not specify the process for obtaining a waiver. Even if the *amici* wanted to plan an exhibit involving a barred individual, it is unclear how they or the artist would obtain a waiver, adding further to the uncertainty the *amici* face.

Respectfully submitted,

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September 18, 2017

APPENDIX

APPENDIX

The following is a complete list of the 101 *amici* art museums:

Ackland Art Museum
(Chapel Hill, NC)
Albright-Knox Art Gallery
(Buffalo, NY)
Allen Memorial Art Museum
(Oberlin, OH)
American Folk Art Museum
(New York, NY)
Andy Warhol Museum
(Pittsburgh, PA)
Art Institute of Chicago
(Chicago, IL)
Asian Art Museum of San Francisco
(San Francisco, CA)
Barnes Foundation
(Philadelphia, PA)
Bronx Museum of the Arts
(Bronx, NY)
Brooklyn Museum
(Brooklyn, NY)
Carnegie Museum of Art
(Pittsburgh, PA)
Chrysler Museum of Art
(Norfolk, VA)
Cincinnati Art Museum
(Cincinnati, OH)
Clark Atlanta University Art Museum
(Atlanta, GA)

Cleveland Museum of Art
(Cleveland, OH)

Clyfford Still Museum
(Denver, CO)

Colby College Museum of Art
(Waterville, ME)

Columbus Museum of Art
(Columbus, OH)

Contemporary Arts Museum Houston
(Houston, TX)

Contemporary Arts Center
(Cincinnati, OH)

Crocker Art Museum
(Sacramento, CA)

Crystal Bridges Museum of American Art
(Bentonville, AR)

Currier Museum of Art
(Manchester, NH)

Denver Art Museum
(Denver, CO)

Des Moines Arts Center
(Des Moines, IA)

Detroit Institute of Arts
(Detroit, MI)

Dia Art Foundation
(New York, NY)

Fralin Museum of Art at the University of Virginia (Charlottesville, VA)

Frances Lehman Loeb Art Center
(Poughkeepsie, NY)

Frick Collection
(New York, NY)

Frist Center for the Visual Arts
(Nashville, TN)

George Eastman Museum
(Rochester, NY)

Herbert F. Johnson Museum of Art
(Ithaca, NY)

High Museum of Art
(Atlanta, GA)

Hillwood Estate, Museum & Gardens
(Washington, DC)

Hood Museum of Art
(Hanover, NH)

Honolulu Museum of Art
(Honolulu, HI)

Indianapolis Museum of Art
(Indianapolis, IN)

Institute of Contemporary Art, Boston
(Boston, MA)

Institute of Contemporary Art, University of Pennsylvania (Philadelphia, PA)

Isamu Noguchi Foundation and Garden Museum (Long Island City, NY)

J. Paul Getty Trust
(Los Angeles, CA)

Jewish Museum
(New York, NY)

Jordan Schnitzer Museum of Art
(Eugene, OR)

Laguna Art Museum
(Laguna Beach, CA)

List Visual Arts Center
(Cambridge, MA)

Los Angeles County Museum of Art
(Los Angeles, CA)

Memorial Art Gallery, University of Rochester
(Rochester, NY)

Memphis Brooks Museum of Art
(Memphis, TN)

Metropolitan Museum of Art
(New York, NY)

Michael C. Carlos Museum of Emory
University (Atlanta, GA)

Mildred Lane Kemper Art Museum,
Washington University (St. Louis, MO)

Minneapolis Institute of Art
(Minneapolis, MN)

Missoula Art Museum
(Missoula, MT)

Montclair Art Museum
(Montclair, NJ)

Morgan Library & Museum
(New York, NY)

Muscarelle Museum of Art
(Williamsburg, VA)

Museum of Art, Rhode Island School of Design
(Providence, RI)

Museum of Contemporary Art Chicago
(Chicago, IL)

Museum of Contemporary Art Cleveland
(Cleveland, OH)

Museum of Contemporary Art Denver
(Denver, CO)

Museum of Contemporary Art, Los Angeles
(Los Angeles, CA)

Museum of Contemporary Art San Diego
(San Diego, CA)

Museum of Contemporary Art Santa Barbara
(Santa Barbara, CA)

Museum of Fine Arts, Boston
(Boston, MA)

Museum of Fine Arts, Houston
(Houston, TX)

Museum of Fine Arts, St. Petersburg
(St. Petersburg, FL)

Museum of Modern Art
(New York, NY)

Nasher Museum of Art at Duke University
(Durham, NC)

Nasher Sculpture Center
(Dallas, TX)

Nelson-Atkins Museum of Art
(Kansas City, MO)

New Museum
(New York, NY)

New Orleans Museum of Art
(New Orleans, LA)

Norman Rockwell Museum
(Stockbridge, MA)

North Carolina Museum of Art
(Raleigh, NC)

Oakland Museum of California
(Oakland, CA)

Peabody Essex Museum
(Salem, MA)

Pennsylvania Academy of the Fine Arts
(Philadelphia, PA)

Philadelphia Museum of Art
(Philadelphia, PA)

Philbrook Museum of Art
(Tulsa, OK)

Portland Art Museum
(Portland, OR)

Portland Museum of Art
(Portland, ME)

San Antonio Museum of Art
(San Antonio, TX)

Santa Barbara Museum of Art
(Santa Barbara, CA)

San Diego Museum of Art
(San Diego, CA)

Seattle Art Museum
(Seattle, WA)

Smith College Museum of Art
(Northampton, MA)

Solomon R. Guggenheim Museum
(New York, NY)

Telfair Museums
(Savannah, GA)

Toledo Museum of Art
(Toledo, OH)

Virginia Museum of Fine Arts
(Richmond, VA)

Wadsworth Atheneum Museum of Art
(Hartford, CT)

Walker Art Center
(Minneapolis, MN)

Walters Art Museum
(Baltimore, MD)

Weisman Art Museum
(Minneapolis, MN)

Westmoreland Museum of American Art
(Greensburg, PA)

Wexner Center for the Arts
(Columbus, OH)

Whitney Museum of American Art
(New York, NY)

Williams College Museum of Art
(Williamstown, MA)

Worcester Art Museum
(Worcester, MA)
Zimmerli Art Museum at Rutgers University
(New Brunswick, NJ)